

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

AUG - 9 1994
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
1994 Annual Access) CC Docket No. 94-65
Tariff Filings)

COMMENTS

BellSouth Telecommunications, Inc. ("BellSouth") hereby submits its Comments in support of that aspect of the Petition for Clarification or Reconsideration of Southwestern Bell Telephone Company ("Southwestern Bell") which addresses the Bureau's requirement that petitions for waiver be filed as a condition precedent to a grant of exogenous treatment of costs under the Commission's price cap rules. The Southwestern Bell Petition ("Petition") was filed in this proceeding on July 25, 1994.

In its 1994 Annual Access Tariff Filing, Bell Atlantic had included as an exogenous cost certain regulatory fees which were recently imposed by the Commission.¹ The Common Carrier Bureau ("Bureau"), in its 1994 Annual Access Tariff Filing Order,² denied exogenous cost treatment for such fees on the basis that Bell Atlantic had not filed a petition for

¹ Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, MD Docket No. 94-19, Notice of Proposed Rulemaking (FCC 94-46), released March 11, 1994, and Report and Order (FCC 94-140), released June 8, 1994.

² 1994 Annual Access Tariff Filings, CC Docket No. 94-65, Memorandum Opinion and Order Suspending Rates (DA 94-706), released June 24, 1994.

waiver of the Commission's exogenous cost rule, Section 61.45(d).³ As explanation for its rejection of Bell Atlantic's handling of the fees, the Bureau stated,

Section 61.45(d) limits the categories of exogenous costs to those listed in the rule and those designated as such by a Commission Order. The regulatory fees at issue are not included among those costs listed as exogenous in Section 61.45(d), nor have they been designated as such in any Commission Order. Therefore, Bell Atlantic's treatment of them as exogenous violates Section 61.45(d) of the rules. Absent a rulemaking, the only means available to Bell Atlantic to obtain exogenous treatment of the regulatory fees is to secure a waiver of Section 61.45(d). Bell Atlantic, however, has not filed a petition seeking waiver of that rule section. Accordingly, we conclude that the Bell Atlantic proposal to treat the regulatory fees exogenously violates our price cap rules and, as such, is patently unlawful.⁴

Southwestern Bell filed its Petition requesting the Commission to clarify or reconsider, inter alia, this aspect of the 1994 Annual Access Tariff Filing Order. BellSouth supports this request.

Nothing in Section 61.45(d) or any other rule of the Commission requires either that a Petition for Waiver be filed in order for a carrier to be permitted to reflect an exogenous cost change in its price cap indices, nor do any rules limit the permitted exogenous cost changes to, to use the Bureau's own words, those cost changes "designated as such in any Commission order." Section 61.45(d) simply states that

³ 47 U.S.C. Section 61.45(d).

⁴ Id., para. 64.

[t]he exogenous cost changes represented by the term "Delta-2"...shall be limited to those cost changes that the Commission shall permit or require. (1) Subject to further order by the Commission, those exogenous changes shall include cost changes caused by

- (i) the completion of the amortization of depreciation reserve deficiencies;
- (ii) such changes in the Uniform System of Accounts as the Commission shall permit or require;
- (iii) changes in the Separations Manual;
- (iv) changes to the level of obligation associated with the Long Term Support Fund and the Transitional Support Fund...;
- (v) the reallocation of investment from regulated to nonregulated activities...;
- (vi) such tax law changes and other extraordinary exogenous cost changes as the Commission shall permit or require;
- (vii) retargeting the PCI to the level specified by the Commission for carriers whose base year earnings are below the level of the lower adjustment mark; and
- (viii) inside wire amortization.⁵

In essence, this provision, insofar as permitted exogenous cost changes are concerned, means that unless ordered otherwise by the Commission, exogenous cost changes are permitted to include such exogenous cost changes that the Commission shall permit. The rule does not state, as the Bureau apparently believes, that the permitted exogenous cost changes are limited to those explicitly listed in the

⁵ 47 U.S.C. section 61.45(d) [emphasis supplied].

rule itself or in a Commission order.⁶ Indeed, there are means by which exogenous cost changes can be permitted to be reflected in Delta-2 other than by Commission order, the most relevant one here being by permitting a tariff filing to take effect which reflects the cost change at issue in the indices.⁷ Such a procedure provides more than sufficient opportunity for review and consideration of the proposed exogenous cost change on its merits to determine whether it should be permitted.

A review of past practice under Section 61.45(d) reveals that carriers under price cap regulation 1) have been permitted exogenous treatment of cost changes which were neither specifically listed in Section 61.45(d) nor designated as permitted exogenous cost changes by Commission order; and 2) have not been required to file a petition for waiver in order to obtain permission for such exogenous treatment. Examples include exogenous cost treatment by

⁶ For instance, the rule does not state that the permitted exogenous changes are limited to those which the Commission has or may permit by order.

⁷ This is in contrast to required exogenous cost changes which would need to be mandated by order in the appropriate proceeding.

LECs of costs associated with the Telecommunications Relay Service Fund⁸ and public utility tax increases.⁹

Indeed, a requirement that a petition for waiver be filed as a condition precedent to treatment of a cost as exogenous presumes there is a requirement which needs to be waived. However, there appears to be nothing which needs to be waived in order for the Commission to permit a cost to be treated as exogenous. Clearly, Section 61.45(d) does not prohibit treatment of the regulatory fees at issue here as exogenous. Nor are permissible exogenous costs static. Rather, under the language of the rule itself, permissible exogenous costs may be identified and included as permitted on an ongoing basis "...as the Commission shall permit."¹⁰ Given the fact that the Commission already has authority under the rule to permit such additional costs, there is nothing which needs to be waived.

In conclusion, the Commission should clarify or reconsider the statement in the 1994 Annual Access Tariff Filing Order that a petition for waiver is required as a condition precedent to a grant by the Commission for

⁸ See, e.g., BellSouth Telecommunications, Inc. Transmittal No. 135, filed August 17, 1993, effective October 16, 1993.

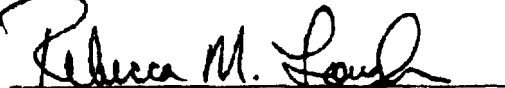
⁹ Bell Atlantic Telephone Companies, Tariff F.C.C. No. 1, Tr. Nos. 492 and 501, 7 FCC Rcd 2165 (1992); Bell Atlantic Telephone Companies, Tariff F.C.C. No. 1, Tr. No. 473, 7 FCC Rcd 1486 (1992).

¹⁰ 47 U.S.C. Section 61.45(d) [emphasis supplied].

permission to have costs treated as exogenous. The Bureau, in its 1994 Annual Access Tariff Filing Order, should have discussed the specific regulatory fees at issue on substantive grounds, such as whether such costs qualify for exogenous treatment under the control and double counting test normally applied by the Commission, rather than have rejected exogenous treatment as per se unlawful on the sole basis that a petition for waiver had not been filed.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.



M. Robert Sutherland
Richard M. Sbaratta
Rebecca M. Lough

Its Attorneys

4300 Southern Bell Center
675 West Peachtree Street, N.E.
Atlanta, Georgia 30375
(404) 614-4907

Dated: August 9, 1994

CERTIFICATE OF SERVICE

I hereby certify that I have this 9th day of August, 1994, served all parties to this action with a copy of the foregoing COMMENTS by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties listed on the attached service list.



Elizabeth A. Stockdale

*Richard Metzger, Acting Chief
Common Carrier Bureau
Room 500
1919 M Street, N. W.
Washington, D. C. 20554

*Gregory J. Vogt, Chief
Tariff Division
Room 518
1919 M Street, N. W.
Washington, D. C. 20554

* Hand Delivery

Robert M. Lynch
Richard C. Hartgrove
Thomas A. Pajda
Southwestern Bell Tel. Co.
One Bell Center, Suite 3520
St. Louis, Missouri 63101

International Transcription Services, Inc.
1919 M Street, N. W.
Room 246
Washington, D. C. 20554

Randy R. Klaus, CPA
Senior Staff Member
MCI Telecommunications Corporation
701 Brazos Street, Suite 600
Austin, TX 78701

Andrew D. Lipman
Jonathan E. Canis
MFS Communications Co., Inc.
3000 K Street, N.W.
Suite 300
Washington, D.C. 20007

Robert J. Aamoth
Competitive Telecommunications Association
Reed, Smith, Shaw & McClay
1200 18th Street, N.W.
Washington, D.C. 20036

J. Scott Nicholls
Manager of Regulatory Affairs
Allnet Communications Services, Inc.
1990 M Street, N.W.
Suite 500
Washington, D. C. 20036

Mark C. Rosenblum
Robert J. McKee
Peter H. Hacoby
Judy Sello
AT&T Corp.
Room 2255F2
295 North Maple Avenue
Basking Ridge, NJ 07920

Richard Junke
Norina T. Moy
Sprint Communications Co., L.P.
1850 M Street, N.W.
Suite 1110
Washington, D. C. 20007

Genevieve Morelli
Vice President & General Counsel
Competitive Telecommunications Association
1140 Connecticut Avenue, N.W.
Suite 220
Washington, D. C. 20036

Mike Pabian
American Operating Companies
Room 4H84
2000 W. Ameritech Center Drive
Room 4H84
Hoffman Estates, IL 60196-1025

Michael Lowe
Bell Atlantic Telephone Company
1710 H Street, N.W.
8th Floor
Washington, D.C. 20006

Richard McKenna
GTE Service Corporation
P. O. Box 152092
600 Hidden Ridge
Room E3J36
Irving, TX 75038

Margaret Girard
Southern New England Telephone
227 Church Street
New Haven, CT 06510-1806

Michael Shortley
Rochester Telephone Corporation
180 South Clinton Avenue
Rochester, NY 14646

John C. Gammie
Wiltel, Inc.
Suite 3600
One Williams Center
Tulsa, OK 74102

Joseph Dibella
NYNEX
120 Bloomingdale Road
White Plains, NY 10605

James P. Tuthill
Pacific Bell/Nevada Bell
140 New Montgomery Street
Room 1522-A
San Francisco, CA 94105

Robert McKenna
U S West
Suite 4700
1801 California Street
Denver, CO 80202

Paul J. Berman
Anchorage Telephone Utility
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D. C. 20044

Ellen S. Deutsch
Citizens Utility Company of California
1035 Placer Street
Redding, CA 96001

***Richard Metzger**
Acting Chief, Common Carrier Bureau
Room 500
1919 M Street, N.W.
Washington, D. C. 20554

***Gregory J. Vogt**
Chief, Tariff Division
Room 518
1919 M Street, N.W.
Washington, D. C. 20554

Cindy Z. Schonhaut
Vice President
Government Affairs
MFS Communications Company, Inc.
Suite 300
Washington, D. C. 20007

*** VIA HAND DELIVERY**